UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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U.S. SECURITIES and EXCHANGE COMMISSION,

Plaintiff,

v. 18 CV 8865 (AJN)

ELON MUSK,

Defendant.

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New York, N.Y.
April 4, 2019
2:00 p.m.

Before:

HON. ALISON J. NATHAN,

District Judge

APPEARANCES

U.S. SECURITIES AND EXCHANGE COMMISSION
BY: CHERYL L. CRUMPTON
STEVEN D. BUCHHOLZ
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MOEZ M. KABA
ALISON L. PLESSMAN

THE DEPUTY CLERK: This is in the matter of the United States Securities and Exchange Commission v. Elon Musk. Starting with the government, counsel, please state your name for the record.

MS. CRUMPTON: On behalf of the Securities and Exchange Commission, I'm Cheryl Crumpton. With me is Barrett Atwood and Steven Buchholz.

THE COURT: For the defendant?

MR. HUESTON: Good afternoon, your Honor. John Hueston, Moez Kaba, and Alison Plessman appearing on behalf of Elon Musk, who is also with us at counsel table.

THE COURT: Good afternoon, counsel. Good afternoon, Mr. Musk.

We are here on the SEC's order to show cause why contempt should not be ordered. I have received the parties' briefing, including sur-reply briefing. I thank counsel for that.

We'll organize ourselves today as follows: You'll have 45 minutes per side, if we need it. And it is the SEC's motion, so you'll go first, and you may reserve time if you'd like, Ms. Crumpton.

MS. CRUMPTON: Thank you, your Honor. If your Honor doesn't mind, I'm going to use the lecturn because I have a couple of documents that I'm going to want to show.

THE COURT: I prefer actually both counsel to use the

podium. And I often say the room is beautiful on the eye, but not on the ear, so please do speak into the microphone.

MS. CRUMPTON: Absolutely. Thank you, your Honor. I doubt it's going to take us 45 minutes, but I would like to reserve a few minutes for rebuttal.

May it please the Court --

THE COURT: Five minutes then?

MS. CRUMPTON: Five minutes should be plenty. Thank you.

May it please the Court. We are here today because Elon Musk has disregarded the preapproval requirement of this Court's order, and has offered a series of shifting justifications to ignore the plain language of what he agreed to and what this Court required him to do.

I'd like to start with a bit of background, and then walk through each of the elements of the standard for civil contempt.

The Court will recall that the SEC brought this case, and the Court entered the order that's at issue based on Elon Musk recklessly tweeting out material information that had no basis in fact to tens of millions of people. It was his lack of judgment and his recklessness that led to serious market disruption and confusion.

Based on Mr. Musk's conduct, the SEC charged him with 10b securities fraud, and two days later, both Mr. Musk and

Tesla agreed to settlements with the SEC. But before this Court would enter those settlements, it required the parties to come before it and explain why they were fair, why they were reasonable, and why they were in the public interest. And your Honor will recall that what the SEC told the Court about why these settlements were fair, reasonable, and in the public interest, is because they included specific corporate governance undertakings, like the preapproval requirement.

This preapproval requirement was the heart of the relief that the Court ordered in this case, because it was designed to address the very harm that was the basis of the fraud charge against Mr. Musk. This preapproval requirement was designed to keep him from publishing inaccurate statements again in the future. But the only way this preapproval requirement serves its necessary purpose --

THE COURT: Just to pause for a moment. Because that briefing in response to my order wasn't in the parties' papers, I don't think. But I looked at it today, and noted that in sub (e) of that document on page two, which is under the broad heading "proposed settlement terms," it takes what is arguably the sort of broadest view that's been briefed to me on the meaning of the provision. It says, "Comply with mandatory procedures to be adopted by Tesla concerning the oversight and approval of his Tesla-related public statements." Right?

MS. CRUMPTON: That's correct. That is correct. And

that preapproval requirement only serves its necessary purpose if Mr. Musk complies with it in good faith.

It's become pretty clear over the course of the last few weeks that he is not doing that. For example, we learned for the first time during the course of this proceeding that Mr. Musk has failed to submit a single tweet for preapproval during the over two-month period from the time that Tesla implemented the preapproval policy to the time that the SEC brought this motion in February.

THE COURT: Just let me pause you for a moment because I tend to think in certain boxes. You're laying out the test for good faith.

MS. CRUMPTON: That's correct.

THE COURT: What you just said was what's become clear is he's failed to comply with the procedures in good faith. Then you're citing a number of post the tweet in issue pieces of evidence.

MS. CRUMPTON: Right.

THE COURT: Where does that fit in? Is it in the language of the consent judgment. Maybe it fits in under diligent effort to comply, etc. Where are you putting that since you're starting me with the question of good faith?

MS. CRUMPTON: Well, we would argue it fits within diligent efforts to comply. And I mean, as Mr. Musk has correctly pointed out, there is some degree of discretion in

the language here. It doesn't say this is a binary process where every single tweet about Tesla has to be preapproved.

THE COURT: I don't think that, do you?

MS. CRUMPTON: No.

THE COURT: What would be a Tesla-related tweet or communication that wouldn't require preapproval?

MS. CRUMPTON: For example, if Mr. Musk wanted to communicate with individual Tesla owners about their personal vehicles on Twitter, something he actually does quite regularly. That's clearly an immaterial tweet that wouldn't require preapproval. But that is not the communication that we are talking about here. The communication that we are talking about here is very, very different. And --

THE COURT: Can I ask you, in your reply brief you listed, similar to what you said a moment ago, I think 10 or so additional communications of Mr. Musk that you said needed preapproval on any of these, and that's something you say about diligent efforts.

Is it the SEC's position that any of those communications required preapproval?

MS. CRUMPTON: Your Honor, we have not moved for a contempt sanction based on any of those tweets. We don't offer them to say that they are all necessarily violations.

THE COURT: My question is are any of them?

MS. CRUMPTON: They may well be. They may well be.

We haven't undertaken that analysis. We are looking at the tweet that is the most clear violation, which is the 7:15 tweet. We would offer that there very well may be tweets within those 10 that we submitted. There is at least one tweet, I believe about the opening of the Tesla Gigafactory, that actually moved the market. So it may very well be that some of those tweets required preapproval.

But we offered them to show that he is regularly tweeting about topics that are specifically laid out in Tesla's policy as communications that could be material and just blowing past that preapproval requirement. He has stated that he's substituted his own procedures for the preapproval requirement.

If you look at paragraph seven of Mr. Musk's declaration to this Court, he says, and I quote: "With my knowledge and approval, Tesla's general counsel and disclosure counsel have been reviewing all tweets promptly in real time upon publication to ensure that any errors are caught and rectified quickly."

That is not what the SEC negotiated in its settlement, and that is not, most importantly, what this Court ordered.

THE COURT: You've taken that out of context, right. He says earlier, the topic sentence here is he's taking his obligations seriously. He's cut his tweeting down substantially. And I think he's pointing here to sort of

diligence efforts, just as you point to post tweeting conduct to show lack of diligence, he is in a sense pointing to post tweeting conduct to show diligence, right. He's not saying that's what the policy requires of him as a sort of after communication step.

MS. CRUMPTON: But what he's not saying in that declaration, and what he doesn't say anywhere in any of the pages and pages of briefing that he submitted to this Court, is the actual analysis that he underwent before he published this 7:15 tweet without preapproval. He's offered you a lot of justifications, but he has never said here is the analysis I went through to decide this reasonably could not contain material information. And instead, he says look at these other things that I did.

And I would submit that there's no need for the general counsel and disclosure counsel to review his tweets in real time upon publication to catch and rectify errors if the preapproval policy is being followed in the way that this Court's order requires it to be.

THE COURT: What if he thought he was just repeating information that had already been publicly disclosed. So let's focus on that. From the SEC's perspective, if he's doing that, if he's simply repeating information that has already been disclosed, there is no question, there is no delta between what he says and what's previously been put out there. Does he

require preapproval?

MS. CRUMPTON: I think it would depend on whether that particular communication fell within the Court's language of communication that reasonably could contain material information. Sometimes merely repeating prior guidance later in time shows that the company is still on track for that guidance, it could potentially be material. So I wouldn't say that there's never a situation --

THE COURT: There is an approved communication that gets put out that says we're going to produce 500,000 cars in 2019, and Mr. Musk -- let's start with a hypo of he retweets that or forwards that as a tweet. Danger of judges not using social media. So he retweets that with some celebratory language. This is great news, see below.

Does that communication need prior approval?

MS. CRUMPTON: I mean, understanding that it is a hypothetical, and I'm giving it the thought as I'm standing here, I --

THE COURT: That's the game.

MS. CRUMPTON: Right. Exactly. I would say that's highly unlikely to be material. If it's just merely repeating something that Tesla has already published.

But that is not the factual situation that we have here.

THE COURT: Of course. And then let's say he makes

some changes, puts a gloss, are the words in the briefing, and it is essentially the same information. Maybe he converts 500,000 cars a year in 2019 to 10,000 cars a week.

Does that need preapproval?

MS. CRUMPTON: Tesla's policy already addresses that scenario. It says if it is not a verbatim unwritten communication that's already been approved, it requires a subsequent preapproval.

THE COURT: The edit provision.

MS. CRUMPTON: Right. This is the provision that says if you've sought preapproval of a communication, and you want to rerelease that communication with any edits, you have to submit it again for preapproval. So Tesla --

THE COURT: I think it is an interesting point which you raise in your opening brief. It wasn't really addressed in the response brief, and then you didn't come back to it in reply. I didn't know why. Just focusing on that language for a second.

I think when I first read that argument in your briefing, I thought, well, that's a good point. I wonder what Mr. Musk is going to say in reply, and then I didn't find anything. So, obviously, Mr. Hueston, you'll have your chance.

But if you look at that language, right, which is on page two of the policy, the second bolded bullet point. There's two subsections to this provision, right, (i) and (ii).

You noted both in your briefing. Mr. Musk's briefing responded to the (ii), but not (i). And the (i) seems the more important point. Reading that and editing out the (ii), it says if an authorized executive further edits a preapproved written communication, after receipt of written preapproval, such authorized executive will reconfirm the preapproval in writing in accordance with this policy, prior to release.

So, also, in Tesla's letter which was attached that focused on (ii) here, and said he is in compliance, SEC, you misunderstood what this means. They, too didn't focus on (i). So why didn't you come back to that in your reply?

MS. CRUMPTON: Your Honor has focused, as we did, with the fact there are shifting justifications here.

The first thing we raised in the first instance in our initial brief, because we were responding to the first justification that Mr. Musk and Tesla offered for why this was okay. If you look at the exhibit that we attached to our first filing, there was a letter from Tesla's counsel on behalf of both Tesla and Mr. Musk. They offered the explanation that this tweet did not -- was not preapproved because it had -- the substance had already been preapproved. And we pointed out that is still a violation of the policy.

THE COURT: Can I ask you, you read this provision as not containing a materiality analysis with respect to the edit? In other words, this provision says if you have a preapproved

statement, so it was originally material. If it gets approved and you make any edits, you have to get it approved again, no matter the nature of the edits?

MS. CRUMPTON: Well, that's what the policy says.

THE COURT: That's the facial meaning of the policy. Do we know from Tesla if it has a different interpretation? We don't.

MS. CRUMPTON: Tesla has not offered a different interpretation that I am aware of, of that provision.

But, I'm glad the Court brings up Tesla, because Tesla's conduct is also troubling to the SEC. This Court ordered Tesla to implement a mandatory preapproval process, but they are apparently fine with Mr. Musk making up his own procedure instead, and deciding whether something needs preapproval based on whether he thinks the sum and substance is already in the public record.

And we would submit that the Court should, for that reason, give no weight to Tesla's opinion with respect to Mr. Musk's conduct in this matter. In fact, the Court should be concerned that, despite the corporate governance undertakings that the Court ordered, Tesla still appears to be unwilling to exercise any meaningful control over the conduct of its CEO. I'd like to focus --

THE COURT: Well, they did get within a few hours a corrective tweet; did they not?

MS. CRUMPTON: They did get a corrective tweet, because the preapproval procedure was not correctly followed. That corrective tweet highlighted that the preapproval procedure was not correctly followed.

While we do not fault Tesla or Mr. Musk for correcting that statement promptly, that's not what this Court ordered Mr. Musk and Tesla to do. We don't want to be in a situation where this designated securities counsel for Tesla is reacting at the same time that the entire world is reading the information that Mr. Musk is tweeting out. The whole point is to stop that before it happens in the first instance.

THE COURT: Right. And the question is, when is he required to do that. You were going to start with the -- I turned you away from the "reasonably could contain" language.

MS. CRUMPTON: Sure. So why don't we start with that. Why don't we start with the fact that that language is clear and unambiguous.

THE COURT: What does it mean?

MS. CRUMPTON: It mean, we know it's broader than the standard for securities fraud, because it contains the language that not just a communication that contains material information, but that reasonably could contain information material to Tesla or its shareholders. So we know just --

THE COURT: Sometimes when I read it I think it's missing something. Like, reasonably could be seen to contain

or reasonably could be -- its meaning seems more like arguably could contain.

Is that phrasing one that you've used before, "reasonably could contain"?

MS. CRUMPTON: Your Honor will be not be surprised to learn that this is a somewhat unusual factual situation, so I don't believe that we have used that formulation.

THE COURT: It's not an SEC term of art.

MS. CRUMPTON: It is not an SEC term of art. But just because something is not capable of mathematical determination, that is what we do in the law. We interpret the words, and we figure out whether the facts before us fit within those words. And I would submit to the Court that this is not even a close call. And the way you know that --

THE COURT: The question is it clear and unambiguous.

MS. CRUMPTON: It is clear and unambiguous.

THE COURT: What does it mean?

MS. CRUMPTON: It means it is broader than the standard that the law puts forth for materiality, and we would argue it essentially means unless something is obviously immaterial, it needs to get preapproval.

THE COURT: Interesting. And you get that as a textual matter? There's case law that sort of suggests that gloss? That what reasonably could contain material information means that, unless it obviously -- unless something is

obviously immaterial, I'm not sure on a spectrum of materiality, if that's right. Where do you get that from?

MS. CRUMPTON: Your Honor, I think we can look at Tesla's own policy to inform what reasonably could contain --

THE COURT: Do I need to do that to interpret the consent judgment?

MS. CRUMPTON: I don't think you do, because I think that this tweet clearly needed preapproval under either the reasonably could contain language or even the contained language.

THE COURT: In other words, I could conclude it's material, and you win, and not have to touch that language.

MS. CRUMPTON: Right. Right.

THE COURT: But if I think it's on the gray area of materiality, if I were to come to that conclusion, I will have to know what that means, and the first step in the contempt analysis is, is that clear and unambiguous. Right?

MS. CRUMPTON: I would note that Mr. Musk did not even raise any ambiguity in the Court's order until his sur-reply. And that there has been no argument up until that point --

THE COURT: Right, but you differ on the meaning. As you pointed out in your briefing, he is just saying materiality. So --

MS. CRUMPTON: Right.

THE COURT: He's read it out.

MS. CRUMPTON: The fact that the parties -- that one party offers a different interpretation can't be the test for ambiguity. All anyone would have to say is, well, I disagree with the SEC's interpretation, and voila, it's now ambiguous.

There is no ambiguity here. If you look at his interpretation of what the language means, it flies in the face of the plain language of the order.

First of all, Mr. Musk argues that preapproval is required only if a communication is material using the narrowest possible definition of materiality. Just absolutely reading out, as you say, the reasonably could contain language that's in the Court's order.

Secondly, Mr. Musk has repeatedly urged the Court to decide whether his communication required preapproval based on whether it moved the market. That can't possibly be the standard. No one is going to know before they publish a communication whether it's going to move the market or not. So that just disregards the concept of preapproval.

There can't be a serious argument here that this 7:15 tweet was not required to be preapproved, either under the materiality prong or the reasonably could contain material information prong. It is material under either definition, and the way we know that is by the course of conduct on February 19. Up until February 19, even though Mr. Musk had been tweeting about Tesla regularly, the SEC assumed that he

had been seeking and receiving preapproval. It wasn't until we saw the February 19 tweets that we were confronted with the obvious evidence of non-compliance.

And for this point, I want to use the document camera just to put up before the Court the two communications that are at issue.

THE COURT: I have them here, but go ahead.

MS. CRUMPTON: At 7:15 Eastern Time, on February 19, Mr. Musk tweeted: Tesla made zero cars in 2011 but will make around 500K in 2019.

And then, according to what happened next, according to what Tesla and Musk said what happened next, is that the securities counsel for Tesla immediately arranged to meet with Mr. Musk at the Fremont factory, and together they drafted a clarifying tweet. And that clarifying tweet, as they call it, is this tweet that was published a little over four hours later at 11:41 p.m. Eastern Time, where Mr. Musk says what he meant to say, and what he meant to say, was Tesla's previous guidance on vehicle deliveries and Model 3 production rates.

And so just those events show you that this was something that had to be corrected. And the Court doesn't need to wade into the materiality analysis that Mr. Musk's attorneys have suggested. And I would submit to the Court that the mere fact that you have to take his 7:15 tweet and compare it to various pieces of other information that was arguably in the

public domain in order to determine that it may or may not have been material, shows it is not a communication that so clearly could not have contained material information that he properly blew past the preapproval requirement.

THE COURT: It goes back to the line I started you on and you pointed to the editing language. But I am still curious, setting aside the argument about editing, if he is repeating without any new information, any significant new information into the mix, in his communication, does that require preapproval?

MS. CRUMPTON: That would be a violation of Tesla's policy, if he hasn't sought preapproval.

THE COURT: Let's say Mr. Hueston's got a great answer on the editing provision, and I don't know what it is. It's not a question of editing. So just in the first instance, is this a communication that needs to be preapproved. And my hypo is it contains no new information.

MS. CRUMPTON: I suspect what Mr. Hueston will argue --

THE COURT: Before you guess that, answer my question.

MS. CRUMPTON: What I was going to say is, if it -- I would suspect that the -- sorry. It's going to be that materiality is the umbrella over which all of this has to be considered. So if it's just simply a repeating of other information verbatim, then how could that be material.

But the Court doesn't have to wade into that difficult question here. Because --

THE COURT: I might if I think that reasonably could contain is not clear or unambiguous. Then I might, right, or I may not even need to get to that question I think it's material.

MS. CRUMPTON: What I'll point your Honor to is the fact that Tesla had never, up until the 7:15 tweet, ever said how many cars it was going to produce in 2019.

THE COURT: That's the analysis, that's the analysis that they just started saying don't worry about that, judge. That's the hypo which you still haven't quite answered. If he's just repeating indisputably already public information, if it adds nothing new to the mix, does he need to get preapproval?

MS. CRUMPTON: As I said before, reaffirming guidance could be material. It depends on the amount of time that has passed between --

THE COURT: Maybe yes, maybe no.

MS. CRUMPTON: Maybe yes, maybe no. It is a fact-specific inquiry under whether or not this is a communication that reasonably could contain material information.

THE COURT: So the reasonably could contain doesn't answer that question. You are not saying, look, if it's --

yes, always. It's things like production numbers, if it is the kind of information.

MS. CRUMPTON: No.

THE COURT: So always yes, so if -- I'm just trying to focus. If he's repeating exactly verbatim information what's already out there, even if it is not verbatim. If he's repeating information that's already out there, it came out yesterday, he's repeating it today. Does he need preapproval?

MS. CRUMPTON: We are not saying always yes or always no to that. It depends, is the answer. But, again, I don't think --

THE COURT: Why? The question is why? Because if we have this incredibly broad notion of reasonably could contain, it's really anything that's in that ballpark, he's got to the get preapproval because we've got to make sure it exactly lines up. That could be an answer.

MS. CRUMPTON: But that's not the answer. The answer is, if it reasonably could contain information that's material to Tesla or its shareholders, then it has to be --

THE COURT: So a tweet about production numbers, forecasted, timeframe, all that. Not necessarily reasonably could contain? That's -- I thought you were proposing a broader meaning to that language.

MS. CRUMPTON: It is going to always be a fact-specific inquiry in terms of what does reasonably could

contain material information.

THE COURT: What does that inquiry look like?

MS. CRUMPTON: The inquiry looks like is this information that on its face is not material. That it does not need the second opinion of a securities lawyer at Tesla before I publish this information to the world. And if you look at --

THE COURT: Sorry. So Mr. Musk can make the assessment, I'm going to put out numbers that are already out. And wow, in the abstract, yes, those might be the kinds of stuff that would be material and I'm constrained on. But I know that it's just exactly like what's been put out already. So I don't need preapproval to make sure I'm right about that.

That is the SEC's position?

MS. CRUMPTON: No, that is not the SEC's position. The problem is that judgment. That, oh, I know that I'm right about this, and I don't need to show it to anybody else because I know that if you combine in various combinations that my lawyer will argue makes this not material, then I don't have to get preapproval. That's what we've seen in this case.

THE COURT: Why doesn't it follow from that, that anything sort in that subject area, that's not his assessment to make under the policy and judgment? I don't understand -- I would have thought the SEC's position is yes, exactly, he can't make that assessment. That's what we've agreed to. He's got to check it with other folks to make sure.

But you won't give me -- I'm surprised. I accept it that it's not the SEC's position that categorically, anything that involves something as clear -- something otherwise seemingly material as projection numbers, production numbers, timeframe, he doesn't need to go to preapproval, because that may be just exactly the information that's already out there.

MS. CRUMPTON: We would still point to Tesla's policy and say that could be a violation of Tesla's policy, if he is putting out information without getting preapproval, and it doesn't fall within (i) and (ii) that the Court identified in the policy.

If you're talking strictly about does this fall under the materiality standard or not, it is impossible to say categorically that anything falls in or out of -- there are certain things, like I said before. Tweeting with individual customers about their individual Tesla. That's pretty close to categorically immaterial. But we're nowhere close to that.

We are talking about a car company's production numbers for the year that have never been tweeted out before. I don't think the Court has to reach the thornier issue of if he had just been verbatim repeating something that had already been said.

THE COURT: That's what he effectively says he did.

MS. CRUMPTON: That's what he says, but that's not correct. It is just not correct.

THE COURT: It is not correct that he was right about that?

MS. CRUMPTON: No, it's not correct that he was just tweeting out information.

THE COURT: He was wrong about that?

MS. CRUMPTON: He was wrong about that. And there's no evidence that he actually did this analysis before he decided that he didn't have to get preapproval. You've seen pages and pages of argument, but they're all lawyer-created arguments about why, if you look at the certain case law that arguably this is not a communication that reasonably could contain material information. But we don't see any subjective analysis prepublication by Mr. Musk.

THE COURT: Is that relevant to the question of whether he has violated the order?

MS. CRUMPTON: It's not relevant to the question of whether he's violated the order. It might be relevant to the question of whether he's diligently tried to comply.

THE COURT: Even if he went through that process, would you still argue that he violated the order?

MS. CRUMPTON: He violated the order because he was wrong. It doesn't require a willful violation in order to be found in civil contempt.

THE COURT: He was wrong that it was the same as information that was already out there.

MS. CRUMPTON: That is correct.

THE COURT: But you don't take the position that he always needs preapproval to make that assessment.

MS. CRUMPTON: Again, it depends on the facts and circumstances of what the information is. We can't say categorically that any particular piece of information is or isn't always material.

THE COURT: Tell me what authority you have for the imposition of contempt when you've got that sort of what you just described. You can't say, can't know for sure whether it crosses the line or not.

What's your best authority that says even with that kind of soft standard -- I want to say "ambiguous" but you'll just say no, we're not -- but that sort of standard, that sort of I can't answer you categorically what, as I stand here, what's in and what's out, you've got to look at all of these factors.

What's your best authority for imposing contempt, given the first requirement of contempt is that the order is clear and unambiguous?

MS. CRUMPTON: Again, you don't need a mathematical categorical certainty in order --

THE COURT: Where is that language coming that you don't need -- that clear and unambiguous doesn't mean mathematical certainty?

MS. CRUMPTON: If you look at all of the contempt cases that Mr. Musk cites --

THE COURT: I am asking you. What cases do you cite for that proposition.

MS. CRUMPTON: Well, for example, if you look at the case, I believe it's called Paramedics Electromedicina Comercial, Ltda. v. GE Medical Systems Information Technologies, Inc. In that case, the court ordered a Brazilian company to dismiss a suit that it brought in Brazilian court. And what the company said was, well, we understood that to mean that we just needed to suspend the suit, and that's what we did. And the court said, no, it's not. You don't get to come up with a standard that is close enough to what I ordered; you have to do what I actually ordered.

And that's the situation we have here, where Mr. Musk has decided to come up with a standard that is, well, if I can make an argument after the fact that this didn't require preapproval, then I didn't have to get preapproval. But that is not what the Court's order says. The Court says if a communication contains or reasonably could contain material information, it requires preapproval. And that language is the same materiality language that the Court --

THE COURT: I started our conversation by saying have you ever used "reasonably could contain" before. Is there a case law that comes from, is that SEC term of art. And I think

the answer was no. This case is unusual.

MS. CRUMPTON: That's right. This case is unusual. But if you look at -- let's take it back just to the materiality standard then. Like, just putting aside reasonably could contain for a moment.

If you look at the seminal Supreme Court case on materiality, Basic v. Levinson. The Supreme Court says, look, this is not a categorical test for materiality. It doesn't mean that we can't figure out what materiality is, because there's not a categorical test.

THE COURT: I think I'm with you on that. But then I think, well, then I am asking was this material. Then the analysis is what's the difference between what he said and what was already out there, right?

MS. CRUMPTON: Well, I would submit that it's not, because it still contains the language reasonably could contain. And while you can't say --

THE COURT: When I push down on material, you go to reasonably could contain. When I push down on reasonably could contain, you go to material. I need you to stand still for a moment.

Do we know what reasonably could contain, do you have any authority for imposition of contempt standards with that sort of fluid multi-factored test? I think the answer to that is no, but you'll let me know if you've got some authority for

that.

And when I focus on materiality, if I say, well, maybe -- so I'm intimating no view. If I think that reliance on the reasonably could contain would make it difficult to conclude that the order is clear and unambiguous, then I might say, well, that doesn't answer the question because I just can start with whether or not it was material information. Right? I don't need to worry about that. It's clear materiality, I think we'll assume, is clear and unambiguous.

Then I think the analysis is, what's the difference between what Mr. Musk put in the tweet and what was already out there.

I want to know if you approach materiality different than that.

MS. CRUMPTON: That is one way the Court could approach this. I would submit that even under just the materiality standard, this was a tweet that required preapproval. But what I would -- but --

THE COURT: That's because the information contained was different.

MS. CRUMPTON: It was different, and it was nothing like the types of immaterial statements that Mr. Musk has pointed to in the cases that he cites in his brief, and I'm happy to take the Court through that.

THE COURT: I agree with you.

MS. CRUMPTON: They're nothing like that. This is a statement that Tesla will make around 500,000 cars in 2019.

THE COURT: If we could focus on, what do you think, because I think there a couple of differences, right. So, I think you are about to walk me through. Let's try to describe this best we can what the difference is between the information out there and what the tweet contained.

MS. CRUMPTON: Sure. With the Court's indulgence, just before we go into that analysis, I would just say that the reason why I shift back to the reasonably could contain language is because, even though I submit that we would win under just if it just said materiality, we know it's broader than that. Because we know reasonably could contain is broader than the legal standard.

THE COURT: I absolutely agree. But I don't think that answers whether it's clear and unambiguous. It's clearly and unambiguously broader than materiality, but where it draws the line I'm not sure.

MS. CRUMPTON: It draws the line I would submit well beyond where we are. Which is a tweet that was material under the materiality standard, and it clearly reasonably could have contained material information.

And I'll point the Court, I want to show the Court the communications that Mr. Musk has pointed to, to show this was information that had already been out in the public domain.

First I want to focus on the investor letter. This is an exhibit that we attached earlier. And this is basically what, after Mr. Musk was forced to correct his tweet, by Tesla's designated securities counsel, it is what he went back. What it says is, Tesla is targeting annualized Model 3 output in excess of 500,000 units, some time between the last quarter of 2019 and the second quarter of 2020.

He says, oh, well, that's consistent with about 500,000 cars. But it's not at all consistent. I mean, reaching an annualized run rate, either at the end of this year or sometime in the middle of next year, is not at all the same as we're going to make 500,000 cars this year.

THE COURT: So one thing it does is it shifts the timeframe.

MS. CRUMPTON: That's right.

THE COURT: From this, which says annualized rate in excess of 500,000 units between Q4 2019 and Q -- so end of 2019, middle of 2020, it moves that to 2019. Right?

MS. CRUMPTON: Right. It moves -- they would already have to be running at that production rate right now in order for his statement to be correct that we will make around 500,000 cars in 2019.

THE COURT: That would be material or what definition?

MS. CRUMPTON: Under any definition.

THE COURT: Right.

MS. CRUMPTON: Under any definition. So, the other statement that we would point the Court to in this investor letter is this statement: In total, we are expecting to deliver 360,000 to 400,000 vehicles in 2019.

This is also what the corrective tweet went back to after Mr. Musk was forced to correct the 7:15 tweet. All he says about this in -- he completely ignores it in his response brief. And then the only thing he says about it in his sur-reply brief is that it's neither here nor there.

THE COURT: Because it's delivery.

MS. CRUMPTON: Because it's deliveries versus production. This is a huge gap between Tesla's deliveries guidance and Musk's statement that Tesla will produce 500,000 cars in 2019. That's extremely relevant.

THE COURT: This is overly simplifying, but it's kind of moving 2019 production -- what his tweet does -- from 400,000 to 500,000.

MS. CRUMPTON: That's exactly right. They say, oh, no, it's not the same. But historically, the deliveries and production have been very close on an annual basis. And if it is their position now that Tesla was going to make 500,000 cars in 2019, but was planning on delivering only 360 to 400,000 of them? That means that Tesla was planning on producing at least 100,000 more cars than it was planning on delivering and recognizing revenue on in 2019. That would have been billions

of dollars in undelivered inventory, and it would have been a departure from Tesla's historical practice. That would have been highly material information.

If that is in fact what they're saying now, I would suggest that is a post hoc justification, because that is not what he said in his corrective tweet. He went back to the official guidance.

Then I would finally, Mr. Musk puts a lot of weight on, as we call it, a cryptic statement during the earnings call.

THE COURT: Does that count, that communication? Is that another violation? I wasn't sure if they clearly rely on it, but do you think it's appropriate to take that into account as to the information that's out there in the market?

MS. CRUMPTON: So that's a good question. Because it is, first of all, an oral statement, so it wouldn't fall under the preapproval requirement. However, the talking points that were prepared for that earnings call did not include the statement that he made on the earnings call.

THE COURT: Talking points are a written communication.

MS. CRUMPTON: Yes, they are written communication and they did not include it. And I would -- in Mr. Musk's brief, he makes it seem like he said, yes, we are going to make 350 to 500,000 Model 3s this year in 2019.

Let's look at the transcript. That is not at all what was said during this earnings call. Even if it was what he said, the fact that you are going to make the high end of the range versus some other point in the range we would submit is material.

But look at what was actually said. So you have an analyst who asks a question about the geographic dispersion of where they're expecting to sell the Model 3s in 2019. And then Tesla's former CEO answers the question, we will start delivering Model 3s in Europe and China, we share a chart showing the potential market size for midsize premium sedans in North America, Europe, and Asia, so that gives a good sense of where we'll be. And then Mr. Musk says, yes, it's maybe on the order of 350,000 to 500,000 Model 3s, something like that this year. With no reference to what "it's" is. Is he talking about sales? Is he talking about deliveries? Who knows what he's talking about. It's not in the talking points, it is never repeated again in any Tesla official guidance.

In fact, just yesterday, Tesla put out again its delivery guidance, and said it expects to deliver 360 to 400,000 cars. And so, this is the closest thing to anything that was already out in the market, and there's no way that investors would understand from context that he was saying Tesla is going to make 500,000 cars in 2019.

This is a material statement no matter how you cut it,

regardless of the standard the Court uses, and it was a violation to not get it preapproved.

THE COURT: Let me just tell you, you're out of your time minus your five minutes reserved. I wanted to ask briefly, there's no mention of sanctions in the SEC's briefing. Are you not seeking sanctions if I hold Mr. Musk in contempt?

MS. CRUMPTON: I'm happy to talk about that now. We have thought about sanctions, and we're happy to address it now or we're happy to wait, if it is appropriate after the Court makes a finding on whether or not to hold Mr. Musk in contempt.

THE COURT: Would you be seeking sanctions?

MS. CRUMPTON: Yes. We -- well, we would be seeking, we would be seeking additional remedies to prevent future violations.

THE COURT: Such as?

MS. CRUMPTON: So, first of all, we think the most important thing to the SEC is that the Court reject Mr. Musk's interpretation of this policy. That if you can come up with a justification after the fact that it's arguably not material, then you don't have to get preapproval. We want the Court to tell him this has to be observed in the way that it's written.

But, we would also suggest that it's appropriate for the Court to impose some additional things to compel compliance with the order. First of all, we think the Court should require Musk to report periodically regarding his compliance.

We think that could be accomplished by providing the Court with a list of his written communications about Tesla, and indicating for each one whether and when he sought preapproval, and if not, why not. And initially we would request those reports be filed monthly.

Second, in the event there are future violations of the Court's order, we believe that a series of escalating fines would be appropriate. And the Court certainly has discretion and broad power to determine the amount of those fines, but they would obviously need to take Mr. Musk's wealth into account as well as statements that he's made in the past about the deterrent effect of the penalty in the underlying securities fraud case.

Just one data point for the Court to consider, Musk has publicly stated that the $20 million penalty he paid as a result of the false tweets about taking Tesla private was, quote, worth it. So we would ask the Court for any future violations to impose a meaningful fine to make it not worth it to have future violations of this Court's order.

THE COURT: So your basic position would be you want some additional compliance compelling mechanism, and what you propose is a monthly reporting mechanism. And clarity that any future violations would lead to a series of escalating but substantial fines. That's the basic outline?

MS. CRUMPTON: That is the basic outline, your Honor.

THE COURT: Thank you.

MS. CRUMPTON: Thank you very much.

THE COURT: Mr. Hueston.

MR. HUESTON: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. HUESTON: Your Honor, the SEC has the burden to show by clear and convincing evidence that the order was clear and unambiguous as written, and also that the proof of non-compliance is clear and convincing, and finally, that the party is not diligently attempting to comply. And their proof has failed on each.

I do want to start with the first showing they must make, and your Honor asked counsel a number of questions about the policy. That, to me, illustrated that it's not clear, and it is ambiguous, because counsel kept hopping from one quasi-definition to another. I'm going to run through them, a series of standards, I heard today what I'm going to describe as yet the fifth standard that Mr. Musk is supposedly going to submit himself to that's not defined in a policy. And if we are looking at, as your Honor has written in your own opinions, the very powerful tool of contempt, there should be a clear and unambiguous policy, and they have not defined it here. In fact, they've defined ambiguity.

THE COURT: Let me ask analytically, and then I'd love for you to do that. If I think this is material information

that was contained in the tweet because it significantly added to the mix of information than what was previously out there, does the uncertainty as to that standard matter?

MR. HUESTON: Yes. Because the SEC has basically stated that the definition of materiality is uncertain. We asserted in our brief, your Honor, the traditional definition of materiality, and they said that doesn't apply.

THE COURT: Let's say I think it meets that. It meets what you've proposed as the definition of materiality. Then it doesn't matter, does it, for purposes of this contempt motion that I might agree with you that the broadening language is unclear?

MR. HUESTON: I think, your Honor, it does. First of all, they have to meet yet the other showings. No diligence, and proof of non-compliance being clear and convincing.

THE COURT: We'll get to that.

MR. HUESTON: Right. But within this, your Honor, the non-definition of materiality, it's not defined, they've contested what it is. In the murk of everything else they describe as a sliding standard, gives an entire context and documents that is simply too ambiguous.

We can't take one word and say it must have been clear to Mr. Musk because now the Court will import and now define definitively what the SEC refused to do, importing definition that's recognized in the courts for what, quote unquote,

materiality is.

THE COURT: What could he be held in contempt for? It sounds like you're saying this order can't be violated by Mr. Musk in a way that leads to a contempt conclusion.

MR. HUESTON: Well, there are two different questions here, your Honor. There is, can he make a mistake, can there be an issue? Yes. Is that separate from should he be held in contempt? That's separate. There you have the very high standards before you bring that very powerful tool.

THE COURT: Just start with prong one.

MR. HUESTON: Let's go to prong one. Here's our position, your Honor. I'm going to get into the policy.

First of all, we think it's very clear that Mr. Musk retained discretion in the policy in the first instance. And the policy makes clear that the tweet is subject to a fact-based determination in that first instance by Mr. Musk.

THE COURT: So I think I'll ask for a direct answer on this. Is there any set of circumstances of what Mr. Musk could do that could lead me to conclude that prong one is met?

MR. HUESTON: That the SEC meets prong one?

THE COURT: Yes. Is there any factual hypothetical you could give me that you can say, yes, under that set of circumstances, the SEC could show that he has failed to comply with --

MR. HUESTON: Yes.

THE COURT: What would that be?

MR. HUESTON: Here's the answer. If they had a clearly defined standard --

THE COURT: No. In the world, this world.

MR. HUESTON: No.

THE COURT: So he can't violate?

MR. HUESTON: Not for contempt. Given the murk that is -- the policy in place.

THE COURT: If I agree with you on that, aren't I obligated -- the Court has to give clear and unambiguous orders.

MR. HUESTON: Yes.

THE COURT: I don't give wishy-washy orders. Doesn't that require either a modification or vacating of this settlement agreement and consent judgment?

MR. HUESTON: Yes, I've given a lot of thought to that, your Honor. Your Honor entered an order, signed, that was subject to very extensive negotiation back and forth. The order doesn't self-execute. It refers to the Tesla policy.

THE COURT: Sure.

MR. HUESTON: And that's where the rubber hits the road, and why we included the drafting history. Because the SEC pretends here today that they're shocked that Mr. Musk had the ability to make his decisions from the get-go, but that's exactly what Tesla negotiated for, and got in the negotiation

with the SEC.

So if we're talking ambiguity, and I think we are, you have to look at the fact that the SEC wanted in the implementing policy the language of, quote, oversight and approval of all his public statements. And they conceded in taking out "and approval of all," which meant simply oversight processes, which Tesla then implemented. They don't like them, but that's what they implemented pursuant to the order that they have.

To answer your question, well, what should the SEC do now, this is what the SEC --

THE COURT: I am asking what should the Court do if I adopted the position that there can be no determination of violation of the Court's order because of lack of clarity.

MR. HUESTON: You should instruct the SEC to clarify with further negotiation with Tesla the terms of the policy. Which I would offer --

THE COURT: I should vacate the consent judgment, modify the consent judgment, and say work it out or litigate?

MR. HUESTON: First of all, let me -- I don't think vacate would necessarily be right, because we've already paid money. That would mean money goes back, we might be back to square one.

What we anticipated, your Honor, if there was an issue, is what parties normally do instead of running to court.

They knock on the door and say, hey, we've seen something here, is there an issue? Let's try to work it out. There was no attempt here to do so. Had that happened --

THE COURT: I'll admit surprise. This screams of working it out.

MR. HUESTON: Exactly. Had that effort been made, I assure you, Tesla was ready to join and make sure there was no misunderstanding.

That effort wasn't, and that's why we're here today. And the last thing that should happen in the context of admitted ambiguity is now throw the bomb of contempt on Mr. Musk. That's not fair.

THE COURT: Well, in the face of ambiguity, no contempt can be brought. But the question then is, if you prevail, and again, I intimate no view. If you were to prevail in that regard, something has to change. Either a modification of the consent judgment or a vacating of the consent judgment because --

MR. HUESTON: I don't think -- your Honor, I don't think your Honor needs to go in and sit at the table. Your Honor can encourage the parties --

THE COURT: That's good. I'm busy.

MR. HUESTON: I know you are, and I'm trying to respect that. The parties should be meeting, conferring, and providing some clarity, so this sort of issue doesn't happen

again.

We certainly want that, your Honor. Mr. Musk doesn't want to come to court and worry about a contempt sanction which he believes will freeze his ability to operate as an effective entrepreneur to get messages out well beyond Tesla to speak even as a shareholder, as he owns 20 percent of stock. Your Honor --

THE COURT: Let me ask you about, I did put out an order, the Second Circuit says I don't have much role, but I did put out an order asking for justification -- I don't like being a rubber stamp -- justification for approving this settlement and entering the consent judgment. I talked about it with your opposing colleague. It says that Mr. Musk, under the proposed settlement terms, Mr. Musk will comply with mandatory procedures to be adopted by Tesla concerning the oversight and approval of his Tesla-related public statements.

And I mean, now in your brief, you would think if you saw that, you would say, oh, no, no, no way, First Amendment, we're not signing on to anything like that, given that it's suggesting that the terms of the settlement include oversight and approval of his Tesla-related public statements. But you didn't.

MR. HUESTON: Your Honor, that was a gateway instruction for the negotiation that did happen afterwards about the policy that would actually govern the day to day.

And in that, after that gateway, which your Honor provided, they engaged knowledgeably, knowingly, crossed stuff out, inserted language like they're trying -- we're going to get to this -- to say it's going to be per se if it hits one of these topics. They conveniently ignore "may, depending on the significance." That is a discretionary allocation that goes to the authorized executive, who is Mr. Musk, and they agreed to take out language that said everything has to be approved. There has to be an oversight process, and Tesla has an oversight process. They're not happy about that today, but we implemented the oversight process.

You provided the clear gateway, and the parties negotiated, and here we are.

THE COURT: So then I think if I think that the policy doesn't require preapproval of --

MR. HUESTON: And it doesn't.

THE COURT: -- statements that are material or reasonably could contain material information -- and you said "and it doesn't"?

MR. HUESTON: Well, sorry, I spoke --

THE COURT: Then Tesla is in violation of my order, no?

MR. HUESTON: No. Because what Tesla did is it followed in good faith your instruction. Negotiate with the SEC, under the umbrella of oversight and approval, and that's

exactly what we did.

THE COURT: I don't think -- no, that's not what I said.

MR. HUESTON: I apologize.

THE COURT: Well, I mean, I might have proposed, right, you might have proposed that I say you'll negotiate in good faith.

MR. HUESTON: When you say according to the policy that was then of course negotiated between the two parties, it's difficult, I think, for us to understand what else could have happened.

And again, your Honor, in the context of a contempt hearing, the very fact that we're having some of this back and forth, illustrates that there's simply not a clear enough standard to use the harsh penalty of contempt.

THE COURT: That might be true. But then I am still curious. Your answer is what happens after that, is you go back to the drawing board.

MR. HUESTON: What happens after that is what the parties should have done, what the SEC should have done, is approached in good faith to try to work things out. If hands were thrown up, then it may have been time for the parties to come back to the Court to seek further clarification and finalization. But that first step should happen, your Honor, and your Honor should invite that first step.

THE COURT: My intent is not only to invite it, but to order it. But we'll we get to that.

Turning to the policy, I understand your position on that. I don't know your position, it is nowhere in your briefing, and correct me if I'm wrong, but I don't see it. Nowhere in your briefing, nowhere in Tesla's letters is there any explanation of your understanding of the meaning of the (i) language in, for lack of a better term, the editing clause.

MR. HUESTON: Yes. I'll give you the citation in a moment, your Honor. We did answer it.

THE COURT: I think what you answered is (ii) and not (i).

MR. HUESTON: You're right, we did.

THE COURT: As did Tesla. Tesla did the same thing.

MR. HUESTON: Because that was what was teed up.

THE COURT: No, they teed up both.

MR. HUESTON: Okay. Here's my answer to this. First, this is not a situation where Mr. Musk is editing anything. He's not editing one of his earlier approved written communications.

Your Honor, what that policy says, if it says approved, your Honor, it presumes it must have been material and not escaped the preapproval process by being immaterial.

Our position here is, what Mr. Musk tweeted was immaterial, and not close to the ambiguous standards which the

SEC has struggled to answer.

THE COURT: But I understood your argument to be that's so because it is, essentially, and certainly true with the corrective tweet, repetitive of information already out there. In other words, this is quoting from your brief: The tweet was simply Musk's shorthand gloss, and entirely consistent with prior public disclosures.

And I presume those prior public disclosures were preapproved written communications.

MR. HUESTON: No, not necessarily, your Honor. The standard is not what you just stated. It's the standard of materiality, and this again goes back to not sure what we're dealing with in terms of clear standards, but if we look at court-adopted notions of materiality, did what Mr. Musk put out there significantly alter the total mix of information. The answer is clearly no. And if he made a statement, they don't like it because it guts their position that there are going to be 350 to 500,000 Model 3 alone cars produced, which when you add it to the 100,000 that's already coming out for S and X, all of which is fairly characterized by "cars," he's clearly within the total mix of information. It does not matter whether some element of that had been preapproved or not. That's not part of the guidance. That's not part of materiality standards.

THE COURT: Just to run it through. If he wanted to,

say, send out a tweet that said we're going to hit 500,000 cars in 2019, and he got preapproval -- let me change that. We're going to hit 400,000 cars in 2019. He got preapproval for that because it would be clearly material. And then before it went out, he wanted to change it to 500,000. You would need to get new approval, right?

MR. HUESTON: Well, with all the premises of your hypothetical.

THE COURT: Of course.

MR. HUESTON: Yes. Because you said it would need approval at first. It had some examination. And then for him to edit it, you would go under the policy and have to abide by the policy, yes.

THE COURT: If the same set of factual circumstances, but he edits it after he sends out the original tweet.

MR. HUESTON: He edits --

THE COURT: He sends out a tweet. He gets preapproval for a tweet. 400,000 cars in 2019. He gets preapproval. He sends it out. And then he edits to say 400,005 cars in 2019.

MR. HUESTON: No. And the answer is there is --

THE COURT: No, he doesn't need preapproval?

MR. HUESTON: He does not, your Honor. Because if in fact you are making an immaterial statement, as that would be, some minor variance would not be viewed by anyone as material. You don't even begin getting into the mechanisms of the policy

that presumes that something is material to begin with.

THE COURT: Just so I understand, forgive the tediousness of the hypo. If he wants to send out a tweet that says 400,000 cars in 2019. He gets preapproval, and before he sends it out, he wants to change it to 400,005 cars.

Does he need approval for that edit before it goes out?

MR. HUESTON: Well, it's not an edit. A tweet is just itself an independent document.

THE COURT: He doesn't send the tweet out. He wants to edit the tweet.

MR. HUESTON: Okay.

THE COURT: Can you do that?

MR. MUSK: No.

MR. HUESTON: No. Not only that, if we're having to debate what this language really means, we are in ambiguity land.

THE COURT: Just because you can propose an argument doesn't mean we are in ambiguity land. My job here is to start with the language you've agreed to and what the policy says. That's what I am trying to do with the hypo, so don't move away from them.

MR. HUESTON: I won't.

THE COURT: If he gets approval for a tweet that says 400,000 cars in 2019. Before he sends it out, he says 400,005

cars in 2019.

Does he need approval for that tweet?

MR. HUESTON: My argument would be he would not, because 405 is immaterial.

THE COURT: How is that consistent with the language "If an authorized executive further edits a preapproved written communication, after receipt of written preapproval, such authorized executive will reconfirm the preapproval in writing in accordance with this policy prior to release."

You are ignoring that language.

MR. HUESTON: Your Honor, I'm not. I think partly I've struggled with two things. That the second -- first of all, that's not an edit. Let's just say for the hypothetical, so you don't believe I'm running away from the hypothetical --

THE COURT: That's a change from 400,000.

MR. HUESTON: So the premise --

THE COURT: If I write on this paper "400,000 in 2019."

MR. HUESTON: If the premise --

THE COURT: Then I cross out it so it says "400,005 in 2019." Your argument is that it's not an edit?

MR. HUESTON: If in fact -- I'm going to agree with you under the following. If in fact the first draft was something that was material or could be material, subjecting itself to approval -- and we're outside of that here, because

obviously we are talking about Model 3 and Model S and X.

THE COURT: All assumed in my hypothetical.

MR. HUESTON: If in fact, then with Mr. Musk's good faith efforts, there is, okay, I'm going to submit this for approval, because it's material, and then two days later he scratches it out and makes an alteration, yes, under the literal term of the policy, he would bring that back again because he is already in the area of materiality.

Here, we're not.

THE COURT: Right. So that's a question. But, I understand your position, you don't think the editing language includes an additional examination of whether the difference between in the edit is material. Under the policy, there is an edit, it needs new approval.

MR. HUESTON: Under the policy, if there is an edit to something that was already deemed to be material, then you can't just rely on that. If you change it, you are going to have to bring something that was already deemed material back to the attention and approval. Yes.

Which is not, of course, the circumstance here.

THE COURT: Except it parallels your argument that what Mr. Musk did was simply put a gloss on already existing material, which is another way of saying "edit."

MR. HUESTON: No, your Honor. What is --

THE COURT: Do we know what Tesla's view is as to

that?

MR. HUESTON: Tesla's view as to what?

THE COURT: As to whether --

MR. HUESTON: Yes.

THE COURT: How do we know that?

MR. HUESTON: Tesla submitted a letter stating that it did not view -- that it did not view Mr. Musk's tweet as material, and viewed him as in compliance with the policy.

THE COURT: To be clear, do we have any idea of Tesla's view as to the meaning of that (i) sentence, the editing sentence?

MR. HUESTON: Your Honor, the editing sentence is not part of what has been submitted, because there wasn't an edit that was really done here and brought to issue. So, there isn't anything submitted on that by Tesla.

I think Tesla very much, by saying he is in compliance -- and by the way, this is something that is a Tesla policy. Tesla has said that he has the discretion to make the call, they viewed what he did as appropriate and not material. In and of itself, your Honor, shows compliance. There has to be deference to the company's interpretation of its own policy. So, they, obviously, coming to that conclusion, that was submitted by Wilmer Hale on behalf of the company. They didn't believe that (ii) somehow rendered what was otherwise appropriate inappropriate.

THE COURT: And I appreciate that, and that's helpful. I don't have their view on the argument that the SEC made with respect to (i).

MR. HUESTON: Remember that letter was submitted, and there has been no amendment to it, despite the argument. Their view is he is in compliance. That (ii) does not render anything in non-compliance.

Your Honor, I do want to very briefly state in terms of clear and unambiguous, the SEC has very much struggled with the definition themselves. They put out two standards that are not even in the written documents, which in and of itself takes you out of the area of contempt.

One, they say, quote, it should contain -- there should be submitting of tweets, if it, quote, contains substantive information about Tesla and its business.

If that were true, there would be no need for the illustrative subcategories that were present. They simply read that out.

THE COURT: They're not exhaustive.

MR. HUESTON: Why put it in there if it was just as clear if there is any substantive information about Tesla. There is even something broader. They put in, quote --

THE COURT: Sometimes examples focus the mind.

MR. HUESTON: Examples could, your Honor, but what should happen here, if the SEC thinks that's the appropriate

definition, it ought to be in the document. You can't simply articulate something that wasn't there, and say now under our articulated standard, they violated.

THE COURT: How do you define the "reasonably could contain" language? I don't see it in your papers.

MR. HUESTON: Well, first of all, it's difficult, it's difficult to assess, but what we believe is that if in fact something is immaterial, that is certainly a proxy for it can't reasonably be material. That is a logical and appropriate inference based in these policies. That is how Mr. Musk has in fact --

THE COURT: You just said it can't reasonably be material.

MR. HUESTON: Not, if it is immaterial.

THE COURT: Sorry. Right. Is that the same as saying reasonably could contain material information?

MR. HUESTON: I'm having trouble understanding what that means.

THE COURT: Well, but, what you just said -- I'll read it from the LiveNote.

MR. HUESTON: Okay.

THE COURT: You said if it's immaterial, then it can't reasonably be -- that's a proxy that it can't reasonably be material.

MR. HUESTON: It can't reasonably contain --

THE COURT: Is your change of language, did that matter?

MR. HUESTON: No, I don't think so. At least in the -- there is nothing definitionally that undermines my position. Again, I think that's a problem of the SEC's burden and not our own. I think, your Honor --

THE COURT: So just work with me on this. I'll read two sentences. You'll tell me if they have similar meaning.

"The communication could reasonably be material to Tesla or its stockholders." That's number one. Number two, "The communication reasonably could contain material information to Tesla or its stockholders."

Isn't the second sentence broader? maybe it's ambiguous. Isn't it broader than the first?

MR. HUESTON: I'm not sure it is, your Honor. I agree that those are different words, and you can argue for greater breadth.

THE COURT: It's two changes. It's changing "contain" to "be," and it's changing what "could" modifies. From "could" so "reasonably could contain."

MR. HUESTON: Right.

THE COURT: To "could reasonably be material."

MR. HUESTON: It can't -- your Honor, even under -- let's just assume for the argument that there is a broader connotation to "reasonably could contain." I think, again,

Mr. Musk has the right, as the authorized executive looking at these standards, to make the first judgment.

THE COURT: He has to apply that standard.

MR. HUESTON: Okay. First of all, it is an ambiguous standard because the SEC has struggled.

I want to make sure I put in my argument, those 15 tweets? So happy they put them in. I'm going to go through several examples, I'd like a five-minute warning on my argument, because they show, by suggesting that he wasn't diligent, that apparently contempt can fall on him for things that he is just merely clearly repeating that's out there from websites and others.

So they want to argue an incredibly broad compass to that, that can't possibly exist.

THE COURT: I'll give you time to do that. But just to follow up on that question. Whatever you would say, even I think your broad argument is Mr. Musk has to in good faith apply the standard contained in the policy, right?

MR. HUESTON: As best he can, with what is there in the policy.

THE COURT: He can't decide on a narrower version of that, just because it's arguably ambiguous.

MR. HUESTON: No. And that's not what we're arguing.

THE COURT: In paragraph seven of his declaration, he did exactly what you did with the words. Last sentence:

"Additionally since the entity of the order and enactment of the policy, I have not tweeted information that I believe is or could reasonably be material."

So he changed, just as you did, and I think narrowed it, he changed "reasonably could contain" to "could reasonably be."

Why is that?

MR. HUESTON: Your Honor, you're asking why a layperson felt that that was his reasonable interpretation of a murky policy. I think it's very difficult. I stumbled and did the same thing, and didn't quite quote the same language. Frankly, it's not just our issue, it's the SEC's because they came up with two new formulations, including a fifth one today, unless something is obviously immaterial. If it's that clear, that standard five, that language ought to be in there. I don't think we'd have the issues that we're fighting about today.

THE COURT: You don't think the language adds anything. They might as well say "material."

MR. HUESTON: No. I guess, no, it's difficult for me.

THE COURT: It adds something. It broadens it.

MR. HUESTON: There is a connotation of potentially greater depth. It is wholly undefined. Therefore, you cannot have a basis on that for contempt. That's the problem the SEC faces here.

THE COURT: And then just to circle back, I don't need to worry about material.

MR. HUESTON: No. Because, first of all, what definition of material are we talking about? They've argued that the one under law doesn't apply.

Let's talk about whether proof of non-compliance is clear and convincing. Point number one, it's Tesla's -- under the order, Mr. Musk has to comply with Tesla's policy. Tesla explains that topics may be material, depending on significance, and that judgment, they say, rests first and foremost with the authorized executive who is Mr. Musk. That is a good faith determination, he's made that in good faith. Tesla found him to make the correct determination. They should be in the position to best interpret their own policy.

THE COURT: It's interesting, because that was your argument in the papers, and I thought that adds nothing to the analysis. But now I understand, because you think it's not the Court's judgment -- you don't think the Court has a role in the evaluation of whether Mr. Musk violated the policy and therefore the contempt judgment.

MR. HUESTON: Well, when you say a role, I mean, you are the signatory to the order. But the implementation is the policy. And then we go to what the policy is clearly saying and not saying.

THE COURT: You don't think I have any involvement in

the analysis of whether Mr. Musk complied with the policy.

MR. HUESTON: Oh.

THE COURT: And therefore complied with the consent judgment.

MR. HUESTON: I'm not saying you don't have. You certainly have a role, and that's why we're here today.

THE COURT: Yes, but if you prevail today, your argument is I have no future role.

MR. HUESTON: Well, not necessarily. Your Honor, the way this -- there was an order that was a gateway to a negotiation with the policy between the two parties. Tesla, one side of the party, has made a submission to the Court saying here's how this policy works. It gives him discretion in the first instance, he has reasonably exercised the discretion. We find that there was nothing material and did not reach the standards.

THE COURT: I shouldn't evaluate whether Tesla's off its rocker or not, right?

MR. HUESTON: No, I think you have to give deference to the fact that Tesla, because this is an interpretation of a policy interpreted between and negotiated between two parties, I think Tesla gets a lot of deference.

THE COURT: So I do apply it myself, but I defer to Tesla.

MR. HUESTON: Because it's their policy, and they're

implementing it, and they are overseeing it, and they've opined on what Mr. Musk did. And of course, because there's discretion provided to Mr. Musk, they are also talking about -- there is the discretion and he exercised it reasonably. That to me is probative. It is not necessarily conclusive, but is highly probative evidence of compliance in and of itself in a contempt proceeding. Let me --

THE COURT: I'm still confused about when it might be somehow different. I can't recall if you did answer this or not. But I think the answer is no, there is no set of circumstances you can imagine by which the Court could conclude that he has failed to comply. That there is some communication he could put out there, without preapproval, and that it's my job to decide whether he's in compliance with the policy or not.

MR. HUESTON: I'll give you a hypothetical that will make it an easier situation.

He puts out a wholly new concrete piece of information that's not forward looking, it's not in the context of cars. It is very specific. Tesla's admits he didn't follow the policy, and it's clearly material.

I suppose -- even here I have trouble, because materiality the SEC says is not the standard that your Honor is speaking with me today.

That may be a situation where, okay, there's no --

even with the discretion provided by Tesla, he didn't abide by that allowance, he didn't exercise his judgment in good faith. We haven't even talked about diligently attempting to comply, your Honor. The fact that there was an effort to correct it later.

THE COURT: I'll still waiting for an answer. Honestly, I don't know. Just say if it is --

MR. HUESTON: I'm having trouble.

THE COURT: Whatever Mr. Musk does, whatever communication he puts out there without preapproval, it is for his determination whether to seek that preapproval, and Tesla's determination as to whether he did that appropriately.

MR. HUESTON: That's right.

THE COURT: Go home, Judge Nathan.

MR. HUESTON: No, your Honor. Well, no. With a caveat that --

THE COURT: I just want an example of where that wouldn't be.

MR. HUESTON: Sure. If we had materiality clearly defined.

THE COURT: Under this consent judgment.

MR. HUESTON: Right.

THE COURT: Give me an example of where I have some role in the evaluation as to whether or not he's in violation of the policy and the order.

MR. HUESTON: You do not on the ambiguous standard set forth here. If it was clear, you would. It is not. I can't even describe a hypothetical materiality issue, because that's been in dispute and not defined.

THE COURT: Right. You're not very imaginative. I can think of things but --

MR. HUESTON: Okay.

THE COURT: I steered you away from the things you wanted to do with the tweets, so I invite that.

MR. HUESTON: Okay. Let me talk first, though, about diligent attempt to comply, your Honor. That is an independent basis for finding that contempt should not apply.

Mr. Musk has diligently attempted to comply. The first thing the SEC put forth as their proof is statements on 60 Minutes.

THE COURT: Before the policy. I am not sure what I do with that, if anything.

MR. HUESTON: Nothing. He gave an honest assessment that there is a possibility a mistake could be made.

By the way, the SEC appears to be following his every word. That was their moment to say, wait a minute, Mr. Musk and Tesla, are you saying he has some ability to decide in the first instance? It was right there in the first transcript.

THE COURT: It was before the policy.

MR. HUESTON: Sure, it was in December. If they say,

wow, that's their intent, they must be closing in on some different interpretation, that would have been an invitation to reach out and resolve any issues.

Mr. Musk hasn't been hiding his approach here, and Tesla has said his approach is appropriate. What they say in reply is they say, well, here are 15 different tweets which show that he is rogue and out of control. Not one of those 15 is misleading. Not one is inaccurate. Almost every one of them doesn't fit under the illustrative topics and categories. Most every one repeats or responds or -- either repeats public guidance or responds directly to a customer, and not one is material.

So I'll give you a few examples of the 15. By the way, he may have tweeted upwards of 80 times arguably in this time period in something related to Tesla. Presumably these are their 15 best examples.

Here's one. "Model 3 midrange EPA rating is actually 264 miles. Slightly higher than prior estimate of 260." Your Honor, that simply repeats updated and accurate information that was available the same time from Tesla's website. That can't possibly be a basis for finding improper behavior, and it illustrates that they don't know and even today can't define what the standard is.

THE COURT: Ms. Crumpton pointed to one. It is escaping me now. But it was a factory or something?

MR. HUESTON: I'm sorry. There is one in here about breaking ground on the Gigafactory.

THE COURT: Gigafactory.

MR. HUESTON: Right. And that was out there for months in terms of there was already an announcement that the Gigafactory was going forward. There was already information in the press that was moving forward with a timeline, and the actual groundbreaking was being talked about. That is my understanding, and again, they haven't provided all their positions for that. That was all publicly available information, nothing new, and not material.

Couple of other examples, your Honor, that they put forward as examples of his egregious misconduct. "Tesla is the safest car per U.S. government testing." That's repeated old news. That had been reported by Tesla as recently as October of 2018 and as far back as 2013 with each of the models being regarded as the safest car under U.S. testing.

Here's another one. "By the way, you can buy a Tesla online in less than two minutes and give it back for full refund for any reason." That was entirely consistent with Tesla's return policy available online. The policy had been in place as early as October 22, 2018.

And then another one. "Tesla with autopilot engaged is twice as safe and continues to make steady improvements." On that tweet he actually cites in the tweet the Tesla

quarterly vehicle safety report, which provides the very figures to say twice as safe.

Your Honor, let me just close if I can, because I know my time is short, with the following. Your Honor, they have not shown that the proof of non-compliance is clear and convincing. There is the Tesla policy itself, and Tesla's judgment that he did not violate. We have the 600,000 cars that is in the total mix of information, that when he says around 500, in a tweet sequence that is celebratory and forward looking, with every hallmark of immateriality, that can't possibly be clearly material, and something that is appropriate for sanction.

One thing that has been glossed over is that we had a Professor Christopher Noe of MIT do an assessment of what the market did. The SEC waves that off and says that's not appropriate to consider. But the case law in this district, U.S. v. Hatfield, U.S. v. Bilzerian, says, although not dispositive, stock price movement afterwards is a consideration for whether it is material or not. The trading volume didn't move, it was lower than normal. The stock price moved less than it did on a usual daily occurrence.

If it was material what he did, the corrected tweet should have been material, and it was not. He looked at analyst reports. No one noted it.

Conclusion, your Honor: Tesla was right that it was

immaterial. Mr. Musk was right that it was immaterial. And the market gave the judgment immaterial. That can't be a basis for declaring it is material and contempt under these ambiguous standards.

Your Honor, one last thing I will say. If the SEC is right, and Mr. Musk, according to them, made some kind of mistake, that's not a place to bring down contempt. They ran in here because Mr. Musk -- this is the facts -- did something he believed was right. The original 7:15 tweet, it's not material. Tesla says, then and now, not material. Disclosure counsel says put out and repeat some other numbers guidance. Mr. Musk doesn't agree, but does it anyway.

This is not someone who is wantonly saying I don't care about processes and procedures in place. He actually does what he is told. And in that situation, your Honor, when someone does make an error, if it is an error, and promptly corrects it, that's not the kind of wanton behavior that merits contempt finding. That is somebody who is trying his best to comply, and who has been diligent. And for the SEC to outline broad ambiguous areas they now say gotcha without an effort to meet and confer earlier, really takes us well outside the area of contempt.

THE COURT: I'll give you a couple minutes, if you want, if I do determine that Mr. Musk is in contempt, do you want to respond to what's been suggested as appropriate

sanctions?

MR. HUESTON: Your Honor, obviously, we do not believe there should be a contempt finding. Let me --

THE COURT: I wasn't clear on that, so thank you.

MR. HUESTON: And also, your Honor, I think there can be -- we've talked about and I see your Honor's, yes, why did you rush in.

There is another pathway if your Honor is concerned about where things are moving forward. It can order the parties to meet and confer and come back if there is a material dispute. If we're going to go down another pathway, that should be not a hammer on Mr. Musk, with his ears ringing, told to go ahead and retool the policy that is ambiguous. We don't believe that's appropriate, your Honor.

We think the right approach here would be, look, there has been a lot of disagreement. There should not be any sort of rewarding of somebody running into court and claiming the sky is falling without some sort of good faith efforts to try to meet and confer and work it out.

That's where I think we expected the SEC to come from. And frankly, if there is an action, that should be the nature of the action here, and nothing more. Because Mr. Musk acted in good faith, he was diligent. And even under the worst of characterizations, promptly corrected what -- or clarified an earlier tweet, even though it wasn't material by anyone's

assessment nor the market's.

THE COURT: Thank you, Mr. Hueston.

Ms. Crumpton, you have five minutes if you want it.

MS. CRUMPTON: Thank you, your Honor.

I'd like to correct a couple of things that have been mischaracterized by the SEC's position. First of all, we have not ever said that the materiality law doesn't apply. What we have said is that right standard of the court's order is broader, because it has the "reasonably could contain" language. But if the Court decides that that reasonably could contain language is ambiguous, it doesn't have to throw out the baby with the bathwater, because this was material, even under the broader materiality standard.

THE COURT: But then aren't we just going to be back here again? Even if that's right, and again, I'm not expressing my view, but if you were to prevail on that, it seems to me we still need to solve the potential problem of an unclear aspect of that.

MS. CRUMPTON: That may be so. We can propose a modification. But I really do think this argument is a bit disingenuous. This is the second time that Mr. Musk's counsel has brought up settlement communications to argue that his interpretation of this order is correct and that the SEC's is wrong.

But he has omitted other very relevant settlement

communications we would offer now that would explain what the parties understood when they negotiated this --

THE COURT: I don't think we need to -- I don't think we need to get into that. I have the understanding of the history of the negotiation of this provision. At the end of the day, I'm not sure that matters at all.

To the extent Mr. Hueston is saying that failure to negotiate prior to the contempt is somehow relevant. Whether or not I think that's right as to how I would expect folks to act, I don't know that it comes into the analysis at all. But, I'm going to give a speech on how that's going to happen going forward.

MS. CRUMPTON: I would like to give the Court a little history of how we came to be standing here. It is not we rushed in to court at the first opportunity. As I said before, there had been a number of tweets over time, Mr. Houston went through some of them. There were others that we attached. As he said, Mr. Musk has tweeted upward of 80 times about Tesla, and the SEC thought nothing of it. We assumed that everyone was proceeding in good faith. That's even after the 60 Minutes interview.

We haven't abandoned the 60 Minutes interview. We offered additional evidence. We didn't feel it necessary to repeat the same points we made in our opening brief.

I would like to point the Court to some particular

language that give us trouble about the 60 Minutes interview. It's the question of Does someone to have to read your tweets before they go out? And Mr. Musk says No. And so then he's asked, So your tweets are not supervised? And he says, Well, the only tweets that would have to be say reviewed would be if a tweet had a probability of causing a movement in the stock.

THE COURT: I hear you. And that's not the only question. As Mr. Houston said, that's not dispositive. But that is before the policy. So it's hard to know how that's supposed to move the needle as to Mr. Musk's approach to the policy.

MS. CRUMPTON: I would suggest that he was saying on national television, before the policy even went into effect, that he didn't intend to comply with it as it was written. He intended to comply with it -- at the time we didn't reach out, because we hoped that was just Mr. Musk saying what he wanted to say on television, and that he was going to actually comply with the policy, and we assumed that that's what happened, until February 19, when designated securities counsel for Tesla had to swoop in, and correct what was unquestionably a material statement that was wrong.

And Mr. Houston has said that he's diligently tried to comply, that the Court shouldn't look at these prior tweets because they're not misleading and they're not inaccurate. That's not the standard. We haven't sued Mr. Musk for

securities fraud. We have brought this action to say he is not seeking preapproval of tweets that if you were a prudent person seeking to seriously comply with this Court's order, you would have submitted for preapproval.

He has just decided that he doesn't have to do that. He can just have his securities counsel read the tweets at the same time as the rest of us do, and if he gets something wrong, well, securities counsel will fix it.

That's not what the Court ordered, that's not the policy, and it's not what the SEC negotiated in this case.

And the last thing I want to address is what weight we should give Tesla, or Tesla's opinion about this policy. The language that is operative here doesn't come from the Tesla policy, it comes from the Court's order. If this is a communication that contains or reasonably could contain material information, the Court ordered him to comply with the preapproval requirement. And Tesla has, for whatever reason, thrown its lot in with Mr. Musk. It has refused to let there be any daylight between him, between their CEO and them. And that is the problem. The reason --

THE COURT: If that's right, has Tesla done what's required of them?

MS. CRUMPTON: We would submit that Tesla's conduct is very troubling, and we're still evaluating whether Tesla has complied with the policy. But we will say that we believe that

the gravamen of the problem is with Mr. Musk's conduct. But there is also a problem that you have a company who undertook to take certain actions to provide oversight of the CEO that appears to have just completely abrogated that responsibility.

Thank you, your Honor.

THE COURT: The motion is submitted. But I did want to make a few points in closing, and, as I've alluded, to a call to action.

Point number one, I must and I will ensure that court orders are followed. It's not optional; it is not a game. I don't care if you're a small potato or a big fish. If you are you under a court order, you proceed cautiously, you follow it, or you seek relief pursuant to available process, period. That's the rule of law.

And point number two, contempt of court is serious business. It is a serious charge to be made, and it is a serious conclusion for a Court to reach. I don't take it lightly, and the SEC carries a significant burden here. In my view, government lawyers should take all available steps to work out disputed issues, be reasonable, come to an agreed-upon resolution if possible, before invoking the significant Court's contempt powers.

Point number three. I have serious concerns that no matter what I decide here, this issue will not be finally resolved. For example, from the SEC's perspective, and again,

I intimate no view, but the SEC could prevail here because I conclude that the relevant tweet was material, but this may not resolve whether the "reasonably could contain" language is clear and unambiguous, and that may open up finality of this consent judgment. Or the SEC may lose here, because they haven't met their burden on one or more the grounds, and that may undermine the enforcement efforts going forward.

The same is true for Mr. Musk, and again, I'm giving no view, but I may conclude that he prevails because I think the judgment or the policy lacked the requisite clarity for contempt purposes. What then happens? Judicial orders must be clear and unambiguous. That would raise the question of whether the judgment needs to be modified or potentially vacated. Or, of course, he may lose and face a contempt determination and sanctions.

So with those points in mind, my call to action is for everybody to take a deep breath, put your reasonableness pants on, and work this out.

I am requiring you within the next two weeks to meet and confer for at least an hour, to make a good faith effort to resolve this matter, both for the immediate contempt motion, and to ensure absolute clarity moving forward so we are not back here again.

So within two weeks from today, I will require a joint letter to the Court confirming that the meet and confer has

taken place, and indicating whether you've reached resolution or are on the cusp of doing so. If not, you'll hear from me in due course with my decision.

I thank counsel for their briefing and argument. We are adjourned.

(Adjourned)